

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

LEONARD GATHRIGHT,

Plaintiff

v.

GRETТА PHILLIPS, et al.,

Defendants

Case No.: 3:19-cv-00487-MMD-CSD

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 64

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is defendant Robert Lamb's motion for summary judgment. (ECF Nos. 64, 64-1 to 64-4.) Plaintiff did not file a response, despite being given an extension of time to do so.

After a thorough review, it is recommended that defendant Lamb's motion be granted.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 8.) The events giving rise to this action took place while Plaintiff was housed at Warm Springs Correctional Center (WSCC). (*Id.*)

The court screened Plaintiff's complaint and allowed him to proceed with an Eighth Amendment deliberate indifference to serious medical needs claim against defendants Phillips, Lamb and the John Doe director of nursing (when Plaintiff learned of his or her identity). The claim is based on allegations that on February 26, 2019, while eating breakfast, Plaintiff found an

1 insect in his fruit. He showed it to Phillips, the food manager, and Lamb, who worked in the
2 culinary. Plaintiff was offered a new tray of food, and Lamb told him the fruit came from an
3 outside vendor. Plaintiff avers that he began feeling ill as a result of having eaten food with an
4 insect in it, and he informed Phillips, Lamb and the nursing director, but Phillips and Lamb
5 refused to send Plaintiff to the infirmary for treatment. He claims the nursing director denied his
6 emergency grievance requesting treatment. Plaintiff asserts that he experienced diarrhea,
7 vomiting, and stomach cramps.

8 Phillips has been dismissed without prejudice for lack of timely service under Federal
9 Rule of Civil Procedure 4(m). (ECF No. 63.) Plaintiff has not timely sought leave to amend to
10 substitute in a defendant for the Doe nursing director; therefore, it is recommended that the Doe
11 nursing director also be dismissed without prejudice under Rule 4(m).

12 Lamb now moves for summary judgment, arguing he did not personally participate in any
13 violation of Plaintiff's rights, and there is no evidence Plaintiff ever told Lamb he was
14 experiencing medical issues and needed treatment. Lamb also argues he is entitled to qualified
15 immunity.

16 II. LEGAL STANDARD

17 The legal standard governing this motion is well settled: a party is entitled to summary
18 judgment when "the movant shows that there is no genuine issue as to any material fact and the
19 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
20 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
21 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome
23 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary

1 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
2 other hand, where reasonable minds could differ on the material facts at issue, summary
3 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

4 “The purpose of summary judgment is to avoid unnecessary trials when there is no
5 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18
6 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
7 of summary judgment is “to isolate and dispose of factually unsupported claims”); *Anderson*, 477
8 U.S. at 252 (purpose of summary judgment is to determine whether a case “is so one-sided that
9 one party must prevail as a matter of law”). In considering a motion for summary judgment, all
10 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
11 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
12 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, “if the evidence of the
13 nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*,
14 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
15 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
16 *Anderson*, 477 U.S. at 249.

17 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
18 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
19 come forward with evidence which would entitle it to a directed verdict if the evidence went
20 uncontroverted at trial.’... In such a case, the moving party has the initial burden of establishing
21 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
22 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
23 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or

1 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
2 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
3 party cannot establish an element essential to that party's case on which that party will have the
4 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

5 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
6 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
7 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
8 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute
9 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."
10 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)
11 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
12 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475
13 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
14 pleadings and set forth specific facts by producing competent evidence that shows a genuine
15 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

16 III. DISCUSSION

17 "The government has an 'obligation to provide medical care for those whom it is
18 punishing by incarceration,' and failure to meet that obligation can constitute an Eighth
19 Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 753 F.3d 1060, 1066 (9th
20 Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)).

21 A prisoner can establish an Eighth Amendment violation arising from deficient medical
22 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
23 *Estelle*, 429 U.S. at 104. A claim for deliberate indifference involves the examination of two

1 elements: "the seriousness of the prisoner's medical need and the nature of the defendant's
2 response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other*
3 *grounds, WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also Akhtar v. Mesa*, 698
4 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)).

5 If the medical need is "serious," the plaintiff must show that the defendant acted with
6 deliberate indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation
7 omitted). "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051,
8 1060 (9th Cir. 2004). Deliberate indifference entails something more than medical malpractice or
9 even gross negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action
10 under section 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present
11 when a prison official "knows of and disregards an excessive risk to inmate health or safety; the
12 official must both be aware of the facts from which the inference could be drawn that a
13 substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*,
14 511 U.S. 825, 837 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

15 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally
16 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
17 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
18 quotation marks and citation omitted). "[A] prisoner need not prove that he was completely
19 denied medical care' in order to prevail" on a claim of deliberate indifference. *Snow v. McDaniel*,
20 681 F.3d 978, 987 (9th Cir. 2012) (quoting *Lopez*, 203 F.3d at 1132), *overruled on other*
21 *grounds, Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014).

22 Lamb presents evidence that Plaintiff never notified him of any medical issues he was
23 suffering as a result of allegedly ingesting an insect, and never requested treatment. (ECF Nos.

64-1, 64-2, and Lamb's declaration at ECF No. 64-3.) Instead, Plaintiff's grievance documentation indicates he did not start experiencing medical issues until *after* he returned to his housing unit from the culinary. This is evidence that Lamb was not deliberately indifferent to Plaintiff's serious medical need.

Plaintiff has not filed a response to create a genuine dispute as to any material fact. Therefore, summary judgment should be granted in Lamb's favor.

IV. RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Judge enter an order:

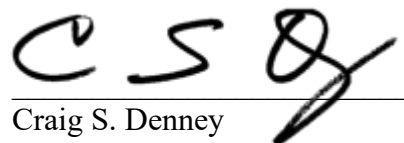
- (1) **DISMISSING WITHOUT PREJUDICE** the Doe nursing director under Federal Rule of Civil Procedure 4(m); and
- (2) **GRANTING** defendant Lamb's motion for summary judgment (ECF No. 64).

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this Report and Recommendation within fourteen days of being served with a copy of the Report and Recommendation. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the district judge.

2. That this Report and Recommendation is not an appealable order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment by the district court.

Dated: May 2, 2023


Craig S. Denney
United States Magistrate Judge